No. 84-1480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ILLINOIS PSYCHOLOGICAL ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE ILLINOIS PSYCHOLOGICAL ASSOCIATION

The Illinois Psychological Association (IPA) hereby respectfully moves for leave to file a brief *amicus curiae* in the above-captioned case in support of the Respondent. The consent of the attorney for the Respondent has been obtained, and his letter evidencing that fact is filed with the copies of this brief. The consent of the attorney for the Petitioner was requested but was refused.

The Illinois Psychological Association has more than 1300 members, and it is the major association of psychologists in Illinois. The case *sub judice* turns, at least in part, on the clinical-diagnostic significance of the silence

of the defendant at the time of his arrest as it impinges upon his sanity at the time of the commission of the offense. The Illinois Psychological Association does not possess unique information relevant to the clinical considerations, and, indeed, any state psychological association or the parent, national psychological association could act in the same role as *amicus curiae*. However, because there currently are pending two cases before the Supreme Court of Illinois on precisely the issue in this case, the Illinois Psychological Association has a more immediate interest in the clinical issues implicated in all the cases.

Accordingly, the *amicus* Association is in a position to assess for the Court the clinical-diagnostic significance of the "silence" involved in the invoking of *Miranda* rights at a level of expertise that the Respondent cannot fairly be expected to address. Thus, the Illinois Psychological Association respectfully requests leave to file the attached brief *amicus curiae*. The arguments set forth in this brief *amicus curiae* are relevant to disposition of this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE ILLINOIS PSYCHOLOGICAL ASSOCIATION

INTEREST OF *AMICUS CURIAE*

The Illinois Psychological Association (IPA) files this brief as *amicus curiae*. The IPA is a voluntary nonprofit, scientific, and professional organization with more than 1300 members. It has been the major association of psychologists in Illinois since 1949 and includes the vast majority of psychologists holding doctoral degrees from accredited universities in the State of Illinois. The IPA's purpose, as reflected in its bylaws, is to promote the

welfare of the public at large through the scientific and professional endeavors of psychology.

Well over half of the IPA's members are involved in the diagnosis and treatment of mild to serious abnormal conditions. In addition, many professional psychologists serve as forensic experts in criminal trials where the defendant's mental state is at issue. Several IPA members with special training and knowledge participated in the production of the American Bar Association's *First Tentative Draft of the Criminal Justice Mental Health Standards* (1983). Many of the Association's substantive sections are also vitally interested in the matters at issue here. Of particular interest is the fact that the precise issue involved in this case is pending before the Illinois Supreme Court in two cases, one involving the death penalty.

Thus, this case is of special concern to psychologists and to the IPA. The IPA is honored to be allowed to present its views on the important questions before the Court, questions on which its expertise and experience can, it trusts, be useful. *Amicus* hopes to provide this Court with a broad-based, empirically oriented perspective in order to help it resolve the complex issues presented by this case.

STATEMENT OF THE ISSUE PRESENTED

Is testimony regarding a criminal defendant's act of invoking the Fifth Amendment right to silence after receiving *Miranda* warnings probative of sanity for purposes of refuting the defense of insanity?

INTRODUCTION AND SUMMARY OF ARGUMENT

In the case at bar, the Petitioner urges that assertion of the Fifth Amendment right to silence after *Miranda* warnings is probative of sanity and should be admissible to refute the defense of insanity. This argument rests on the dual assumptions that the wish to remain silent reflects rational, mature, lucid decision-making and judgment and that psychosis, the basis for the Respondent's insanity defense, is definitionally characterized by illogic, incoherence, and the absence of lucidity and judgment. Such assumptions, which are essential to the Petitioner's argument, are incorrect scientifically.

A few cases of severe mental disorder do resemble the popular idea that "crazy" people show total lack of contact, babbling speech, and purposeless activity. Most do not. In fact, a great deal of mental functioning remains intact even in cases of profound disturbance, and mental disorder is not synonymous with mental retardation. The symptom picture may differ markedly from one disordered person to another and in the same individual from time to time. Even in so complex a range of abnormal conditions, the fact of "silence," either literal mutism or the active assertion of the right to remain silent, ordinarily is not determinative of a diagnosis. The scientific literature cited in this brief *amicus curiae* supports the opinion of the Court of Appeals for the Eleventh Circuit.

ARGUMENT

TESTIMONY REGARDING A CRIMINAL DEFENDANT'S ASSERTION OF THE FIFTH AMENDMENT RIGHT TO SILENCE AND/OR THE RIGHT TO COUNSEL WHICH STEMS FROM THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION SHOULD NOT BE ADMISSIBLE. IT IS NOT SUFFICIENTLY PROBATIVE TO OUTWEIGH THE CONSTITUTIONAL PROHIBITION AGAINST PENALIZING A DEFENDANT FOR ASSERTING HIS RIGHTS BY USING THAT FACT AS EVIDENCE AT TRIAL.

A.

The Defendant's Exercise Of His Fifth Amendment Right To Remain Silent Is Not Probative Of Sanity.

No special expertise is required to identify profoundly bizarre and deviant behavior as "abnormal." The person who responds to disembodied voices of absent beings, who sees things no one else sees, and who announces special powers such as clairvoyance or mental telepathy is quickly recognized as "crazy" by the proverbial man in the street. But the notion that this severely disturbed individual represents the typical case of mental disorder is an all too common misconception belied by the subtlety involved in diagnosis of mental disturbance by psychologists and psychiatrists. Publication in 1980 of the Third Edition of the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association (hereinafter cited as "DSM-III") occurred only after five years of study and preparation by a large task force representing a variety of professional groups and interests. The extensive printed text in the DSM-III attests to the complexity of mental disorders and their diagnoses.

Occasional cases of severe disorder do indeed meet the popular notions about "crazy" people. Delirious mania, the most intense state of bipolar disorder (formerly known as manic-depressive illness), is characterized by incoherent speech, constant and purposeless activity, and total lack of contact. Likewise, chronic organic brain syndromes result over time in impairment of orientation, memory, intellect, judgment, and affect, and may ultimately require custodial care. A. Freedman, H. Kaplan, and B. Sadock, *Modern Synopsis of Comprehensive Textbook of Psychiatry-II*, 500, 526 (2d ed. 1976) (hereinafter cited as "*Synopsis*"). But impairment of this degree is the exception rather than the rule. Most persons who suffer mental disorders, even those which are severe enough to support an insanity defense, do not match the stereotypical notions of

> a weird lot who spend their time ranting and raving, posing as Napoleon, or engaging in other bizarre behavior. In fact, most hospitalized patients are quite aware of what is going on around them, and only a small percentage exhibit behavior that might be labeled bizarre. The behavior of most mental patients, whether in a clinical setting or not, is indistinguishable in most respects from that of "normal" people.

J. Coleman, J. Butcher, and R. Carson, *Abnormal Psychology and Modern Life*, 7, 10 (7th ed. 1984) (hereinafter cited as "*Abnormal Psychology and Modern Life*").

In fact, mental functioning is generally left undisturbed even in so severe a disorder as schizophrenia. Consciousness, attention, orientation, and memory are unaffected, and intellectual capacity, including acquired knowledge and the ability to solve tasks, is comparable to that of the general population. J. Page, *Psychopathology*, 186 (1971) (hereinafter cited as "*Psychopathology*"); Mayer-Gross Slater and Roth, *Clinical Psychiatry*, 275-276 (3d ed. E.

Slater and M. Roth 1969) (hereinafter cited as "*Clinical Psychiatry*"). The Massachusetts Supreme Court was quite correct in holding that "[i]nsanity is not the equivalent of stupidity" in the context of an exercise of *Miranda* rights. *Commonwealth v. Mahdi*, 388 Mass. 679, 448 N.E. 2d 704, 713 (1983). Schizophrenia is also characterized by the absence of any single, unifying feature fundamental to the condition and necessary for its recognition, and the symptom picture may differ markedly from one schizophrenic person to another depending on his or her life situation and environmental circumstances. P. McHugh and P. Slavney, *The Perspectives of Psychiatry*, 59 (1983); *Abnormal Psychology and Modern Life*, 354; *Clinical Psychiatry*, 288. There is, in fact, an entire subclass of schizophrenia known as pseudoneurotic schizophrenia in which patients present predominantly neurotic symptoms and reveal schizophrenic abnormalities of thinking and emotional reaction only on close and careful examination. *Synopsis*, 450.

As a working definition for purposes of this brief, the term "psychosis" is regarded as the equivalent of "mental disease or defect," "mental disorder," "mental infirmity," "disease of the mind," or any other reference to mental illness, however it may be styled, as the threshold requirement of the insanity defense. Psychosis may be defined as follows:

> Mental disorder in which a person's mental capacity, affective response, and capacity to recognize reality, to communicate, and to relate to others are impaired enough to interfere with his capacity to deal with the ordinary demands of life.

Synopsis, at 1324.* The term psychosis is generic and includes both thought disorders and affective disorders. The primary characteristic of affective psychoses is disturbance in mood; thought and behavior disturbances are secondary characteristics. *Synopsis*, at 1280. While the affective psychoses satisfy the threshold requirement of the insanity defense, this brief focuses on the thought disorders in view of Respondent Greenfield's diagnosis of paranoid schizophrenia.

Under the heading thought disorders is found schizophrenia, the most frequently occurring psychosis, and the other paranoid states. Schizophrenia, representative of the thought disorders, is characterized primarily by a disturbance in thinking and behavior and secondarily by a disturbance in mood, the converse of the affective psychoses. *Synopsis*, at 1327. Respondent Greenfield was diagnosed as suffering from paranoid schizophrenia, a subcategory of the schizophrenic disorders. The essential features of this disorder are prominent persecutory or grandiose delusions, or hallucinations with a persecutory or grandiose content. DSM-III, 191. Separated only by degree are the paranoid disorders including paranoia and acute paranoid disorder.

> While paranoid psychoses are given a separate heading in the official psychoses nomenclature and (at least, in the case of paranoia) have long been recognized as a psychiatric disease entity, the conditions

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* The inclusion of the psychoses is consistent with the judicial formulation set forth in *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962), in which mental disease or defect is defined as including "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."

> have close similarities to paranoid schizophrenia, and many clinicians have believed that they should be regarded as varieties of the latter.

C. Hofling, *Textbook of Psychiatry for Medical Practice*, 404 (3d ed. 1975).

The Petitioner in this case urges that proof of Respondent's legal insanity as a result of paranoid schizophrenia is undermined and contradicted by evidence that he invoked the right to be silent after receiving warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Nowhere in the description of the psychoses listed in DSM-III does the concept of "silence" enter into consideration, and it is insignificant in arriving at a diagnosis of a psychotic condition. Similarly, there is absence of mention of any diagnostic significance of silence in the myriad of textbooks on clinical psychiatry and abnormal psychology, a fact which underscores the lack of importance attached to "silence" as a factor either indicating or ruling out mental disorder. The task of demonstrating the probative value of silence diagnostically is thus a logical impossibility comparable to proving that something does not exist.

There are, of course, two meanings of the word "silence." One refers to the complete absence of a response. This instance, in which the individual says nothing, is not only not helpful to the Petitioner's argument but in fact may be symptomatic of an underlying psychosis. An extreme clinical symptom known as "mutism" is synonymous with stupor. This is defined as:

> Disturbance of consciousness in which the patient is nonreactive to and unaware of his surroundings. Organically, it is synonymous with unconsciousness. In psychiatry, it is referred to as mutism and is commonly found in catatonia and psychotic depression.

Synopsis, 1317, 1331. Other conditions in which mutism may occur are mania, epilepsy, and delirium. 3 *American Handbook of Psychiatry*, 278 (2d ed. S. Arieti 1974). Mutisın may also refer to a less severe functional inhibition of speech and vocalization frequently found among schizophrenics, many of whom tend to be monosyllabic and to answer questions as briefly as possible without being altogether uncooperative. A. Freedman, H. Kaplan, B. Sadock, 1 *Comprehensive Textbook of Psychiatry-II*, 898 (2d ed. 1975) (hereinafter cited as "1 *Comprehensive Textbook*").

A second meaning of "silence" used in the legal context of this case is the affirmative act by the accused of asserting the right to remain silent after receiving *Miranda* warnings. This behavior is not inconsistent with and may even be suggestive of psychopathology. The individual who actively asserts his Fifth Amendment rights to silence and/or the assistance of counsel* may do so as a function of being a litigious, paranoid schizophrenic zealously guarding his delusional "rights" and aims.

> A common form of paranoia is the litigious type. . . . [I]t will usually be found that this type of paranoiac individual was always stubborn and insistent upon his "rights". . . . Fundamentally, it is often not a question of law and justice, as the patient insists, but of attempts to put others in the wrong, to show that he was right, that he is superior, in order that thereby his sensitive insecurity may be strengthened and the weak points of his personality may be protected.

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* Opinions on both sides of the instant question agree that the right to counsel in this context stems from the Fifth Amendment right against self-incrimination. *Greenfield v. Wainwright*, 741 F.2d 329, 336 (11th Cir. 1984); *Sulie v. Duckworth*, 689 F.2d 128, 130 (7th Cir. 1982). See *Miranda v. Arizona*, 384 U.S. 436 (1966).

L. Kolb and H. Brodie, *Modern Clinical Psychiatry*, 448 (1982). This description of litigiousness in paranoia applies as well to paranoid schizophrenia.

Even if the affirmative act of invoking the right to silence is not suggestive of pathology, it certainly is not inconsistent with psychosis. Schizophrenia is a thought disorder which frequently results in the inhibition of language.

> The majority of schizophrenics are uncommunicative. They rarely initiate conversation. If asked a direct question, they may give a brief answer, remain silent, or make some cryptic and seemingly irrelevant response. Since speech is a medium of interpersonal communication, the sparse or mystifying speech of the schizophrenic may reflect his alienation or disinterest in his social environment. Deluded patients may refrain from speaking because they are afraid to express inner thoughts or are ordered by voices to keep silent.

Psychopathology, 188. When schizophrenics do answer questions, it is often because that is the easiest way to meet the social demands in being questioned. R. White, *The Abnormal Personality*, 541 (1948) (hereinafter cited as "*Abnormal Personality*").

Schizophrenia is also characterized by linguistic patterns which superficially appear rational but in fact reflect severe disturbance. One example is echolalia, a phenomenon in which the individual repeats in his or her answers to the interviewer's questions the same words or phrases used by the examiner. To the untrained listener, such responses may appear to be a meaningful confirmation of the information sought. In fact, echolalia is thought to signal nothing more than the striving of a schizophrenic with impaired ideation to maintain an active rapport with the interviewer. "He acts much like somebody who is

learning a new language and who, in answering his teacher's questions, uses as many of the teacher's words in the strange language as he can possibly manage." 1 *Comprehensive Textbook*, 898. Thus, the questioner might conclude that the psychotic individual has engaged in an exercise of rational judgment when all that may be inferred properly from the communication is that the individual is markedly confused.

Another linguistic characteristic reflecting schizophrenic thought disturbance is the fact that syntax is disturbed less than the semantic meaning of the communication. It has been observed that the grammatical form of the answer usually is correct even though there has been a disruption in associations. The resulting communication may appear rational but in fact may be meaningless. B. Maher, "The Language of Schizophrenia: A Review and Interpretation," in J. Neale, G. Davison, and K. Price, *Contemporary Readings in Psychopathology*, 234 (1974). Of course, many schizophrenics do not exhibit language disturbance at all. *Id.*, 236.

There are other reasons why psychotic behavior including speech may be interpreted erroneously as normal. Paranoid schizophrenics, although agitated and argumentative, may remain essentially emotionally responsive, alert, and verbal. G. Davison and J. Neale, *Abnormal Psychology*, 405 (3d ed. 1982) (hereinafter cited as "*Abnormal Psychology*"). In addition, chronic schizophrenics are often capable of fulfilling the demands of reality while maintaining their delusional systems in a secretive and compartmentalized fashion, a process known as encapsulation. *Clinical Psychiatry*, 276. Some paranoid schizophrenics are able to keep

> an almost impassable gulf between the real and delusional world. . . . Nothing in their behaviour betrays their abnormality. They converse rationally about any

> topic, and may show natural emotional reactions, though restricted in intensity and warmth. A stranger may talk to them for hours without seeing anything unusual. Only if some special point is mentioned, the flow of delusions breaks out, as if a sluice-gate had opened. An entirely new person seems to be speaking.

Id., 292. An observer of encapsulated delusions thus has no way of knowing of the existence of the delusional belief unless "the right button is touched."

Another aspect of delusional belief in the schizophrenic is the manner in which its expression may be made quite believable, particularly to the naive observer. Delusional thought processes are not necessarily fragmented. *Abnormal Psychology*, 405. As a delusional belief becomes increasingly systematized, it is correspondingly less likely that the lay observer or listener will recognize it as a delusion. This phenomenon is not at all uncommon among persons who suffer from paranoia.

> Aside from the delusional system, such an individual may appear perfectly normal in conversation, emotionality, and conduct. Hallucinations and other obvious signs of psychopathology are rarely found. This normal appearance, together with the logical and coherent way in which the delusional ideas are presented, may make the individual most convincing.

Abnormal Psychology and Modern Life, 388.

This wide range of symptoms suggestive of or consistent with psychosis renders the assertion of the right to remain silent a problematical act from the point of view of the questioner who is required to interpret the behavior. An observer who has little or no background information available must read into the conduct of the accused what his or her own motivation might be under similar circumstances. If the course of action decided on

is consonant with the *observer's* reality as measured by lucid and rational standards, it is interpreted as evidence of "good," "intact," or "normal" judgment. See 1 *Comprehensive Textbook*, 795. But projections by observers of ambiguous conduct have no probative value with respect to the mental state of the actor. (Nothing expressed herein should be construed as proposing a limitation on the clinician's right to consider the clinical significance, if any, of silence in the context of the entire diagnostic syndrome.)

Sometimes, an appearance of lucidity and rationality may indeed reflect a moment of rational judgment. The symptom picture in schizophrenia may change markedly over time.

> Most schizophrenic people "fade in and out of reality" as a function of their own inner state and the environmental situation. They might be in "good contact" one day and evidence delusions and hallucinations the next.

Abnormal Psychology and Modern Life, 354. Unpredictable variability or inconsistency is, in fact, a specific characteristic of schizophrenia. A schizophrenic patient may be incapable at one moment of carrying on a simple conversation yet may compose a sensible letter or play a sophisticated game of chess a short time later. 1 *Comprehensive Textbook*, 622-623. Thus, an interval of genuinely rational decision-making at the time of an arrest does not in itself reflect the mental state of the individual at the time of the offense.

The opinion of the Eleventh Circuit Court of Appeals in the instant case is entirely consonant with the body of knowledge and expertise which "*amicus curiae* represents." The opinion recognizes the variety of mental disorders which may give rise to the insanity defense, the variability of psychosis over time and the wide range of

symptoms which may be present at different intervals, and the deceptive quality of the symptoms to the untrained observer. The opinion specifically discusses the persecutory delusions which may underlie a demand for legal protection. *Greenfield v. Wainwright*, 741 F.2d 329, 333, 335 (11th Cir. 1984). For the variety of reasons expressed herein and reflected in the body of scientific literature, it is clear that assertion of the Fifth Amendment right to silence is not significantly probative of the existence *vel non* of psychosis at the time of commission of the offense and thus of sanity or insanity.

B.

The Constitution Forbids The State From Penalizing A Defendant For Exercising His Fifth Amendment Privilege By Using That Fact As Evidence At Trial.

The rationale of this Court's opinion in *Doyle v. Ohio*, 426 U.S. 610 (1976), is predicated upon considerations of unfairness and estoppel as well as evidentiary ambiguity. The rule of *Doyle* forbids the prosecution from placing a cost on the defendant's assertion of his *Miranda* rights by using it as evidence against him. The State is not allowed to penalize a defendant for exercising his Fifth Amendment privilege by showing that he stood mute or claimed the privilege in the face of an accusation. *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37 (1966).

> . . . . [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle v. Ohio, 426 U.S. at 618.

In *United States v. Hinckley*, 217 A.D.C. 262, 672 F.2d 115 (1982), the government argued that the defendant in an insanity case in effect "testifies by proxy" by raising the affirmative defense through the testimony of expert and lay witnesses. The Circuit Court of Appeals found no basis for converting the limited impeachment exception to *Doyle* into a general license to use the same evidence for rebuttal and found no explanation for singling out the insanity defense.

> All defense testimony is in a sense testimony by proxy, yet the government concedes that it would not seek to apply its rebuttal theory to an alibi or other affirmative defenses. We can find no reason for such a distinction.

672 F.2d at 134.

The *Hinckley* opinion was followed by the New York Supreme Court in *People v. Ricco*, 56 N.Y.2d 320, 452 N.Y.S.2d 340, 437 N.E.2d 1097 (1982). In that case, the State used statements taken in the absence of *Miranda* warnings to overcome the defense of insanity by showing their inconsistency with the defendant's claimed delusional state. Citing *Hinckley*, the court rejected the State's argument that a defendant who raises insanity should be deemed to have waived his Fifth Amendment rights. 452 N.Y.S.2d at 343-344.

An attempt to distinguish between "guilt" and "sanity" for purposes of applying *Miranda* and *Doyle* is specious. When guilt is predicated on sanity, silence is being used to show guilt no less than in any other case. A defendant who raises insanity is assured no less than any other defendant that he or she may rely on *Miranda* rights without being penalized for that reliance at trial. In the traditional *Doyle* case, evidence of silence is used to show the mental state of consciousness of guilt; in an insanity

case, it is used to show the mental state of lucidity. In both of these instances, the probative value of the evidence is either nonexistent or so diminished that it cannot justify the penalty placed on the constitutional right asserted.

The speciousness of a distinction between "guilt" and "sanity" for purposes of applying *Miranda* and *Doyle* has been recognized in opinions from several jurisdictions. In *People v. Rucker*, 26 Cal.3d 368, 162 Cal. Rptr. 13 (1980), the State attempted to rebut the defendant's diminished capacity defense by introducing evidence of statements obtained in violation of *Miranda* requirements. The California Supreme Court found "irrelevant" a purported distinction between substantive use of the evidence and its use to show an ability to respond logically. *Miranda* and the exclusionary rules protecting the Fifth Amendment privilege apply regardless of the purpose for which the evidence is introduced, and admission of the evidence in *Rucker* was reversible error. 162 Cal. Rptr. at 26-27.

Rucker was followed in two cases involving post-*Miranda* exercise of rights. In *People v. Schindler*, 114 Cal. App. 3d 183, 170 Cal. Rptr. 461 (1980), the State introduced the defendant's announcement that he would make no statement until he talked to an attorney as evidence rebutting the defense claim of a "panic state" and diminished capacity. The court found the evidence sufficient to uphold a murder verdict but held the State's rebuttal evidence to be reversible error. In *People v. Fabert*, 127 Cal. App. 3d 607, 179 Cal. Rptr. 702 (1982), the State introduced evidence of the defendant's exercise of the Fifth Amendment privilege to show "presence of mind" and to rebut the defense theory of "dissociative reaction" and diminished capacity. Once again, the court held the evidence inadmissible and ruled that prosecutorial use of the evidence to convey the impression that the defense was

fabricated exacerbated the prejudice, struck at the core of the defense, and was not cured by a limiting instruction.

In *Commonwealth v. Mahdi*, 388 Mass. 679, 448 N.E.2d 704 (1983), the Massachusetts Supreme Court held that, assuming post-arrest silence had any probative value, the use of such evidence to show sanity did not substantively differ from its use to show guilt or to impeach.

> The ultimate constitutional right at issue is still the right to remain silent. . . . Fundamental unfairness results from the use of evidence of such silence regardless whether the person exercising his or her constitutional right to remain silent claims insanity as a defense.

448 N.E.2d at 713-714. In *Mahdi*, evidence of post-arrest silence struck at the jugular of the insanity defense and, in view of the conflicting psychiatric testimony, could not be considered harmless error. 448 N.E.2d at 715.

In *State v. Burwick*, 442 So.2d 944 (Fla. Sup. Ct. 1983), the Florida Supreme Court found the *Miranda-Doyle* estoppel argument to be as forceful in the context of an insanity defense as it is in any other. Pointing out that the State can show the defendant's ability to carry on a rational and coherent conversation without specifically revealing an exercise of constitutional rights, the court found it fundamentally unfair for the State to lure the defendant into remaining silent and then to use that very silence at trial. 442 So.2d at 948.

In *People v. Vanda*, 111 Ill. App. 3d 551, 444 N.E.2d 609 (1st Dist. 1982), the Illinois Appellate Court held that it is constitutionally abhorrent to require the defendant to surrender a constitutional right to avoid being penalized at trial for its exercise, a principle which applies with equal force where the inquiry is sanity rather than "guilt."

> A constitutional privilege remains a constitutional privilege in either event and a defendant who raises an insanity defense should not be denied the protection of the Constitution simply because the crux of his case revolves around his mental state.

444 N.E.2d at 618-619. The reasoning of *Vanda* and all of the other cited authorities is consonant with this Court's long-standing admonition that the insanity defense cannot, any more than any other, be prejudiced by the admission of unconstitutionally seized evidence. *Kaufman v. United States*, 394 U.S. 217, 230 (1969).

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* respectfully urges that this Court should affirm the judgment of the Court of Appeals for the Eleventh Circuit.

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